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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FEDERICO SALDIVAR,

Defendant and Appellant.

H042887

(Monterey County
Super. Ct. No. SS151298)

Defendant Jose Federico Saldivar challenges the following probation condition:
“Do not possess tools used for the express purpose of facilitating a burglary or theft, such as: pry bars, screwdrivers, pick lock devices, universal keys or implements, or other such devices without the express permission of your supervising probation officer.” He claims that this condition is unconstitutionally vague because it lacks a mental state element. We conclude that the condition’s vagueness may be resolved by modifying it to expressly state the mental state element that is ambiguously suggested by its language.

I. Background

On August 16, 2015, a police officer found defendant sleeping in the driver’s seat of a car that had been stolen on August 6, 2015. Defendant told the officer that the car belonged to a friend and that he was working on it. Defendant’s hands were covered with grease and oil, and parts of the car’s steering column were on the floor of the car along

with some electrical equipment. A metal file was on the floor near the driver's seat, and a shaved key was in the ignition. Numerous keys, including some that were "freshly filed," were also on the floor. Defendant was on probation at the time with a probation condition that he not possess burglary tools.

Defendant was charged by complaint with felony receiving a stolen vehicle (Pen. Code, § 496d, subd. (a))¹ and misdemeanor possession of burglar's tools (§ 466). He entered into a plea agreement under which he pleaded no contest to the receiving count in exchange for felony probation, dismissal of the possession count, and resolution of two other cases. The court accepted his plea, dismissed the possession count, suspended imposition of sentence, and placed defendant on probation for three years with numerous conditions. One of the probation conditions was: "Do not possess tools used for the express purpose of facilitating a burglary or theft, such as: pry bars, screwdrivers, pick lock devices, universal keys or implements, or other such devices without the express permission of your supervising probation officer."² Another probation condition was that he "Obey all laws." Defendant timely filed a notice of appeal challenging only his sentence.

II. Analysis

"Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool *with intent feloniously to break or enter* into any building . . . or vehicle . . . is guilty of a

¹ Subsequent statutory references are to the Penal Code.

² Defendant's trial counsel challenged this probation condition: "I don't think there's any nexus." The court rejected this challenge.

misdemeanor.” (§ 466, italics added.) Unlike section 466, the probation condition imposed by the trial court does not contain a clearly expressed specific intent element. Instead, the condition prohibits defendant from possessing “tools used for the express purpose of facilitating a burglary or theft”

The Attorney General appears to concede that the wording of the condition is ambiguous. In her view, “[t]he phrase ‘used for the express purpose’” either “describes the probationer’s mental intent required for a violation of probation . . . [intended to be] used [by you] for the express purpose . . . [or] the phrase ‘used for the express purpose’ . . . is a modifier for ‘tools’ and not for the probationer’s knowledge, *creating a vagueness problem* where a probationer is left to guess at whether a tool is one that is primarily used by persons to commit a burglary or theft.” (Italics added.) She argues that this ambiguity must be resolved in favor of the first alternative because it is more consistent with the wording of the condition.

We disagree with the Attorney General. “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) A probationer should not have to resolve ambiguities in the language of a probation condition in order to determine what the condition prohibits. Since the Attorney General concedes that the condition is vague unless it applies only where the tool is “[intended to be] used [by you] for the express purpose” of burglary, the appropriate remedy is to modify the condition to expressly include that clarifying language.

III. Disposition

The probation order is hereby modified so that the challenged condition reads: “Do not possess tools intended to be used by you for the express purpose of facilitating a burglary or theft, such as: pry bars, screwdrivers, pick lock devices, universal keys or

implements, or other such devices without the express permission of your supervising probation officer.” As so modified, the order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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